

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OREE RILEY,

Defendant-Appellant.

UNPUBLISHED

October 9, 2003

No. 238196

Wayne Circuit Court

LC No. 01-002303-01

ON REMAND

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court.¹ In our previous opinion, we affirmed defendant's prison sentence of nine to fifteen years for his conviction of unarmed robbery, MCL 750.530.² Our Supreme Court, in lieu of granting leave to appeal, remanded the matter back to us for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Upon reconsideration, we vacate defendant's sentence and remand for resentencing.

Because the offense occurred after January 1, 1999, the statutory sentencing guidelines apply. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3); *Babcock, supra* at 256. "[O]nly those factors that are objective and verifiable may be used to judge whether substantial and compelling reasons exist" *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). Further, "the reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Babcock, supra* at 257, quoting *Fields, supra* at 67.

¹ *People v Riley*, order of the Supreme Court, entered August 29, 2003 (Docket No. 123848).

² *People v Riley*, unpublished opinion per curiam of the Court of Appeals, issued April 3, 2003 (Docket No. 238196).

In imposing a minimum sentence nearly twice as long as the highest minimum sentence indicated by the guidelines,³ the trial court identified four reasons for its upward departure:

- (1) Victim was elderly widow, targeted for a broad daylight robbery;
- (2) Victim's injuries have taken from her many of her everyday activities;
- (3) Defendant has a history of violent robberies;
- (4) Defendant and another committed brazen daylight robbery that has ruined quality of life.

In our original opinion, we found three of these factors to be substantial and compelling reasons for departure.⁴ But we found the fourth factor, to the extent that it considered "ruined quality of life" was not objective and verifiable.

Our Supreme Court recently examined and reviewed the application of the sentencing guidelines:

Because the trial court must articulate on the record a substantial and compelling reason to justify the particular departure, if the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it must determine whether the trial court would have departed and would have departed to the same degree on the same basis of the substantial and compelling reasons alone. If the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, or determines that the trial court would not have departed to the same degree on the basis of the substantial and compelling reasons, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure. [*Babcock, supra* at 260-261 (footnotes omitted).]

After review of the record, we cannot determine whether the trial court would have departed, and would have departed to the same degree, if it had not improperly considered the "ruined quality of life" caused by defendant's crime. Accordingly, we vacate defendant's sentence and remand for resentencing. On remand, if the trial court determines that substantial and compelling reasons are presented such that a departure is warranted, it shall rearticulate the reasons for such a departure on the record. MCL 769.34(3).

³ The guidelines indicated a minimum sentence of between twenty-nine and fifty-seven months' imprisonment.

⁴ Hoekstra, J. dissenting, agreed that the fourth factor was improperly considered, but also determined that the victim's injuries and defendant's prior record were not properly considered because they were previously taken into account in the guidelines scoring.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Helene N. White